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SUMMARY RECORD OF THE 683rd MEETING

Held at Headquarters, New York,
on Thursday, 15 June 2000, at 3 p.m.

Chairman:

Mr. Jeffrey CHAN

(Singapore)

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The meeting was called to order at 3.05 p.m.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued) (A/CN.9/466, 470 and 472 and Add.1-4; A/CN.9/XXXIII/CRP.4)

1. Mr. KRONKE (Observer for the International Institute for the Unification of Private Law (UNIDROIT)), said that UNIDROIT, having prepared two draft texts on secured transactions, was conscious of the expectation of many countries that the cost of credit for infrastructure investments could be reduced through improvements in the legal framework for taking security. There was now a need to co-ordinate the draft UNIDROIT Convention on International Interests in Mobile Equipment with the UNCITRAL draft Convention on Assignment in Receivables Financing. The UNIDROIT draft would apply to secured transactions where security was taken in clearly delimited categories of high-value and extremely mobile equipment which was intended to cross borders on a daily basis or to be located outside any national territory. The assets to which it would apply were uniquely identifiable "associated rights". It would create a genuinely international interest, which if registered would give its holder priority, and the register would be based on assets, not debtors. In the past, the Commission had been reluctant to endorse the solution preferred by the UNIDROIT secretariat for coordinating its work with that of UNCITRAL, which was to exclude from the sphere of the UNCITRAL draft Convention the assignment of those few receivables which became "associated rights" by virtue of the financing arrangements proposed in the UNIDROIT draft Convention. However, its objections had been overcome through the definition of the mobile equipment to be covered by the UNIDROIT draft Convention, which was now confined to aircraft equipment, railway rolling stock and space property. UNIDROIT had set up three expert groups to deal with those types of equipment.

2. At a recent meeting of Government experts in Rome, it had been asked why, under the UNIDROIT system, the claim followed the security interest, instead of the other way round, as in most legal systems. The answer given by the UNIDROIT Rapporteur was that it would otherwise be necessary to deal with assignment, thus encroaching on the domain of the UNCITRAL draft Convention. The UNIDROIT text was now being finalized and would be put to a diplomatic conference in the near future.

3. He emphasized that manufacturers, buyers, financiers and the legal profession were looking to the work of both bodies for clarity and predictability in the law. It was important to avoid vague or ambiguous terminology. The best solution would be simply to exclude, in straightforward terms, the limited areas covered by the UNIDROIT draft from the scope of the draft UNCITRAL Convention.

4. Mr. WARSCHOT (Observer for the International Institute for the Unification of Private Law (UNIDROIT)) explained that he was responsible for the working group on railways, which represented railway interests in Europe, North America and South Africa. His group shared the concerns of the working group on aviation regarding the compatibility of the provisions of the UNCITRAL draft Convention with a specified category of receivables, that of associated rights

in financed mobile equipment. Both working groups favoured the exclusion of those receivables from the scope of the UNCITRAL draft Convention.

5. Mr. STITES (Observer for the International Institute for the Unification of Private Law (UNIDROIT)) said that the working group on space objects, for which he was responsible, represented the global aerospace industry, satellite operators and the financial community. His working group took the view that space objects, like railway equipment, should be dealt with in protocols specifically covering such equipment.
6. Mr. BURMAN (United States of America) welcomed the collaboration of UNIDROIT and hoped that the respective interests of UNCITRAL and UNIDROIT could be clearly delimited in the two forthcoming instruments. Each text must respect the scope of application of the other, and for that purpose, the Commission should ensure that its own draft was free of complications. It was important to facilitate the financing of the transactions involved in international infrastructure.
7. Mr. MORÁN BOVIO (Spain) also expressed his appreciation of the work of UNIDROIT and its endeavours to co-operate with the Commission. The UNIDROIT draft Convention was much narrower in scope than the Commission's, but the problem remained of resolving contradictions between the two. There was a danger that the long-term financing system envisaged in the UNIDROIT draft would conflict with the short-term arrangements contemplated for receivables in the Commission's text. Because the receivables covered in the work of UNIDROIT were financed in a highly specific manner and had their own refinancing arrangements, they were in effect separated from the receivables covered in the Commission's own draft. In his Government's view, it was therefore unnecessary to exclude them from the Commission's text. He was anxious to know whether the UNIDROIT representatives perceived the two sectors as being different in nature and, if so, what the differences were with regard to instalments of payment.
8. The CHAIRMAN invited the Commission to resume its discussion of the additional definitions proposed by the European Banking Federation (EBF) (A/CN.9/472/Add.1, p. 12) for inclusion in article 6 of the draft Convention on Assignment of Receivables. The observer for Canada had suggested deleting from the proposed definition of "financial contract" the last phrase, which read "and any collateral or credit support related to any transaction referred to above".
9. Mr. WHITELEY (United Kingdom) said that his delegation was prepared to withdraw its original objection to the Canadian suggestion.
10. Mr. COHEN (United States of America) said that, subject to the change in the definition of "financial contract" just read out, his delegation fully supported the EBF definition of "netting agreement".
11. The CHAIRMAN noted that there seemed to be tentative agreement on the definitions of "financial contract" and "netting agreement" but little interest in considering further definitions. He therefore invited the Commission to resume discussion of the exclusion in subparagraph (ii) (F) of the United States proposal in document A/CN.9/XXXIII/CRP.4.

12. Mr. COHEN (United States of America) recalled that the previous afternoon the Secretary of the Working Group on International Contract Practices had suggested an alternative wording of "receivables arising from the sale or lease of real estate". His delegation would support that change, which would ably serve the purpose of avoiding conflict with long-standing local real-estate law.

13. Mr. STOUFFLET (France) said that he saw no problems in excluding receivables arising from a sale of real estate, but he had some doubts about the wisdom of excluding receivables arising from a lease. The securitization of future lease payments, particularly on commercial space, was a common method of financing for real-estate companies. Securitization of mortgages was also a growing practice. He did not see that their exclusion was justified.

14. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that, although he had suggested new wording for the exclusion, he was not yet convinced that receivables from real estate should in fact be excluded. The problem appeared to be that the priority rule whereby the law of the assignor's location would apply to receivables arising from real estate would conflict with the normal rule in real-estate law whereby the law of the location of the property would apply. The observer for Canada had suggested the approach of devising a different priority rule for assignment of real-estate receivables rather than excluding them altogether. It also appeared that the draft Convention could usefully cover securitization of receivables secured by mortgages if the priority-rule problem was appropriately dealt with.

15. Mr. DOYLE (Observer for Ireland) said that his delegation supported the exclusion as redrafted. He had clear instructions that the industry in Ireland was unhappy about having the draft Convention apply to any aspect of real estate, including securitization of mortgages.

16. Ms. WALSH (Observer for Canada) said that her delegation would prefer a more qualified approach short of outright exclusion, so that securitization transactions on lease and mortgage payments could enjoy the benefits of the draft Convention other than the priority rule. Her delegation would be willing to propose language to that effect if the Commission wished.

17. Mr. BERNER (Observer for the Association of the Bar of the City of New York) noted that the exclusion as it stood mentioned only the sale or lease of real estate. Since many lawyers would not consider sale and mortgage to be the same thing, if the Commission wished the exclusion to cover mortgages as well, perhaps the wording should be "receivables arising from the sale, mortgage or lease of real estate".

18. Mr. MORÁN BOVIO (Spain) said that assignment of lease or rental payments accounted for a substantial movement of funds, and it would be advantageous for that market to be covered by the draft Convention. He wondered if the Irish objections to application of the draft Convention to real estate related to sale only or extended to lease receivables as well.

19. Mr. DOYLE (Observer for Ireland) said that his delegation was aware that the Commission worked by consensus and, having put its reservations on record, would not oppose any measure acceptable to the group as a whole. His

instructions had been to report that industry in Ireland would be unhappy with the application of the draft Convention to real property, and specifically with its application to securitization of mortgage receivables. He had no special instructions as to leases.

20. Mr. COHEN (United States of America) said that his delegation would like the exclusion to refer to the sale or lease of real estate, for two reasons. First, in the law of many States, rental or lease income was considered to be an interest in real estate and was covered by local law. Second, it was not always easy to distinguish lease from sale; many complex transactions called "leases" were, in economic reality, sales.

21. Ms. McMILLAN (United Kingdom) said that her delegation would prefer the exclusion of receivables from both the sale and the lease of real estate. If, however, there was a broad consensus not to exclude lease receivables, her delegation would agree, but only if the priority rule pertaining to them was altered.

22. Mr. SCHNEIDER (Germany) said that his delegation shared the concerns of the observer for Ireland and would like to have the wording of the clause specifically exclude receivables secured by mortgages.

23. Mr. MORÁN BOVIO (Spain) said that, if Governments had given delegations instructions concerning real estate, it was out of a concern to protect domestic real-estate systems. However, the draft Convention was designed for international use. The Commission should bear in mind the needs of construction firms planning large projects in developing economies. If their access to credit was restricted because they were not covered by the draft Convention, development would suffer. From that perspective, it was perhaps worthwhile to follow the suggestion of Canada and seek an accommodation of the rules applying to jurisdiction in order not to exclude such transactions from the benefits of the draft Convention.

24. Ms. WALSH (Observer for Canada) said that her delegation was not in favour of excluding receivables that took the form of rights to payment under a mortgage. Potential conflicts with local real-estate law could be dealt with through a relatively minor change in article 24 to the effect that the choice-of-law rule would apply without prejudice to a person with an interest in the land under the law of the jurisdiction where the land was located. In other words, if the competition for priority was between two assignees or an assignee and an insolvency administrator, the law of the assignor's location would continue to apply. But if the competition was between an assignee of the receivable and a claimant with an interest in the land who was entitled to priority under the law of jurisdiction where the land was located, the draft Convention would revert to the lex-situs rule.

25. Mr. DOYLE (Observer for Ireland) said that his delegation preferred the formulation that would exclude receivables arising from sale or mortgage of real estate. Traditionally, real property came under national law, and mortgages in his country were viewed as part of real property. Any alternative rule would be a fundamental deviation from Irish law and would make ratification of the draft Convention much more difficult. The wording proposed by the Association of the

Bar of the City of New York and supported by Germany would meet Ireland's concerns, whereas Canada's proposal did not, but his delegation would abide by the consensus of the Commission.

26. Mr. STOUFFLET (France) said that he heartily supported the proposal of Canada, which should be viewed, not as a compromise, but rather as the fruit of a remarkable legal analysis.

27. Mr. KUHN (Observer for Switzerland), supported by Mr. MEDIN (Observer for Sweden), said that his delegation supported the Canadian proposal. The Commission should be careful about excluding more from the draft Convention than was strictly necessary. In the important area of project financing, for example, many projects involved real estate, and the assignment of receivables flowing from them would therefore remain outside the draft Convention if the latter contained a wholesale exclusion of real estate.

28. Mr. COHEN (United States of America) said that his delegation would have to consider the Canadian proposal in writing before responding to it.

29. The CHAIRMAN said that there seemed to be general agreement on excluding sales of real estate but divided opinion on leases and securitization of mortgages.

30. Ms. WALSH (Observer for Canada) said that her delegation's proposal would work equally well for receivables arising from either leases or mortgages. Before the Commission considered article 24, her delegation would try to devise language applicable to one or the other or both.

31. Mr. BURMAN (United States of America) said that he wished to make the point for the record that most project-financing structures were deliberately designed so that the flow of receivables would not be tied to the real property and hence to local real-estate laws.

32. The CHAIRMAN invited the Commission to turn to consideration of exclusion (ii) (G) in the United States proposal (A/CN.9/XXXIII/CRP.4).

33. Mr. COHEN (United States of America) said that his delegation proposed excluding drawing rights or rights to payment under a letter of credit or independent bank guarantee because such receivables were covered by other international instruments and well-known rules, such as the Uniform Customs and Practice for Documentary Credits and the International Standby Practices (ISP98). The Commission should be wary of dealing with those categories in a way that would conflict with carefully elaborated systems.

34. The CHAIRMAN said that, in the absence of comment, the exclusion could be considered as meeting with tentative approval, and the Commission could move on to consideration of exclusion (ii) (H) of the United States proposal (A/CN.9/XXXIII/CRP.4).

35. Mr. COHEN (United States of America) said that although receivables arising from foreign-exchange contracts fell partly under subparagraphs (ii) (A) and (ii) (C) of his proposal, there were foreign-exchange contracts that did not fit

into either of the categories of regulated future exchanges or netting agreements. Nor were they well-suited to Convention rules, many of which would need to be re-examined if the receivables in question were not excluded. The foreign-exchange market was highly specialized and was already functioning well.

36. Mr. SCHNEIDER (Germany) asked for examples of receivables that had not been covered by the two other exclusions.

37. Ms. GROSS (Observer for the International Swaps and Derivatives Association (ISDA) and the Financial Markets Lawyers Group) said that, although it had become common in the past several years for banks and their customers to conduct foreign-exchange transactions under ISDA Master Agreements, many transactions were still not governed by such documents. Banks, relying either on set-offs under local law or set-offs in bankruptcy, simply agreed to exchange currencies, confident that they could thus net all amounts payable to the customer against all amounts payable to them by the customer. If, however, any of those amounts were to become assignable to other creditors, thus interfering with netting, it would have a seriously deleterious impact on banks that were counting on having a total exposure to the customer on a net basis.

38. Mr. FRANKEN (Germany) observed, that even in the cases just described, banks could no doubt enter into agreements which, though not based on an ISDA or some other master agreement, provided for a netting procedure; in which case, transactions involving currencies would in fact be covered by financial contracts that came under the definition of a netting agreement.

39. Mr. DESCHAMPS (Observer for Canada), concurring, said that agreements such as foreign-exchange contracts between commercial banks and exporters contained netting provisions and therefore fell within the definition of a netting agreement under subparagraph (ii) (C) of the United States proposal. Consequently, subparagraph (ii) (H) was unnecessary.

40. Ms. GROSS (Observer for the International Swaps and Derivatives Association (ISDA) and the Financial Markets Lawyers Group) said that many banks did indeed enter into foreign-exchange contracts with netting provisions. However, many foreign-exchange contracts were concluded on a Reuters dealing system, where confirmation contained merely the terms, with no provision for netting. Banks entering into such contracts were relying on statutory, not contractual, netting provisions.

41. Mr. MORÁN BOVIO (Spain) said that, having listened to the ISDA expert, he now favoured exclusion. The fact that such contracts were not always netting agreements might give rise to assignable credits, and the draft Convention should not cover such credits derived from foreign-exchange contracts. Although the transactions in question represented a very tiny market, it was a well-functioning and very particular one that should be excluded.

42. Mr. RENGER (Germany) said that the more he heard, the more he was convinced that there was no logical reason for exclusion. Banks concluding foreign-exchange contracts had autonomy and complete freedom of contract and could add netting provisions if they wanted such transactions to fall outside the

Convention. The Commission needed a legal basis for excluding something from the draft Convention.

43. Ms. GROSS (Observer for the International Swaps and Derivatives Association (ISDA) and the Financial Markets Lawyers Group) observed that the foreign-exchange market was actually very large: a total of 1.2 trillion dollars per day was traded, with economic results very crucial to the health of the world financial system. Foreign exchanges were conducted under a centuries-old system of contract operations. She urged the Commission to hesitate before adopting provisions that would upset the balance and liquidity of the financial markets.

44. Mr. WHITELEY (United Kingdom), agreeing with the German delegation that there should be justifiable reasons for all exclusions to the draft Convention, suggested that in the current instance one possible reason might be that certain States wanted to control transfers of foreign exchange and that a provision allowing assignment despite such controls would not be desirable. That was not currently a United Kingdom concern, although it had imposed such controls in the past.

45. Ms. McMILLAN (United Kingdom) drew attention to article 4 (2) of the draft Convention, which allowed Contracting States to list in a declaration all assignments to which the Convention would not apply. For the sake of consistency, that paragraph too should be deleted.

46. Ms. WALSH (Observer for Canada), referring to the first point made by the United Kingdom delegation, said that her delegation did not read the draft Convention as superseding national regulatory law on foreign-currency exchanges, money laundering and the like. The Commission would be revisiting those issues and making them explicit in draft article 9. As to draft article 4 (2), it was precisely because of the illogicality of allowing Contracting States to expand or contract the scope of the Convention at will that the text had been placed in square brackets.

47. Mr. STOUFFLET (France), noting that the foreign-exchange market was not the only one that dated back centuries, said that he agreed with the German delegation that logic and rationality had to be maintained, even in small matters. The Commission should not take a decision that would please a particular sector when there was no legally justifiable reason to do so.

48. Mr. DOYLE (Observer for Ireland), supporting the delegations of France and Germany, said that the Commission had set out to give receivables as wide a scope as possible and to exclude them only when there was an overwhelming reason for so doing. For instance, it had been clear that the draft Convention could not apply to bank deposits. On the other hand, the fact that the insurance industry did not wish insurance contracts to be covered by the draft Convention had not been deemed a sufficient reason; and the same applied to foreign-exchange contracts.

49. Mr. BERNER (Observer for the Association of the Bar of the City of New York) noting that the goal of the draft Convention was to break down barriers to increased global financial transactions, said that including foreign-exchange

contracts in the Convention did not appear to contribute in any way to that goal. Foreign-exchange operations had a long history, and there was no point in introducing uncertainty into well-established practice. By including foreign exchange contracts, the Commission would be discouraging parties from entering into such contracts because they would have to deal with a whole body of new law, with no compensatory contribution to international trade.

50. Mr. MORÁN BOVIO (Spain) said that, far from being useful to the foreign-exchange market, the draft Convention would hinder it by allowing assignment. That alone was legal reason enough for exclusion.

51. Mr. BURMAN (United States of America), recalling that the general purpose of the draft Convention as set out in the preamble was to promote the availability of international commercial credit to markets at more affordable rates, said that the Convention could make a particular difference in regions that had need of credit but a limited capacity to obtain it. That should be the Commission's litmus test for every provision. It was a question, not of providing rationales, but of serving industries.

52. The CHAIRMAN said that there was clearly need for more consultations on the issue. He would be interested in hearing further from the actual practitioners.

53. Mr. DUCARQIR (Observer for the European Banking Federation (EBF)) said that obviously the United States delegation had correctly stated the objectives of the draft Convention. If, however, the Convention could introduce useful rules, it should surely do so. He had received no mandate from Federation banks to argue for exclusion, and he therefore favoured inclusion.

54. Mr. PICKEL (Observer for the International Swaps and Derivatives Association (ISDA)) said that the foreign-exchange market was the single most efficient market in the world, trading a daily total of over a trillion dollars in all the world's currencies. In the process, it provided low-cost access to foreign exchange, and the goals of the preamble were thus being largely achieved already through the marketplace.

55. Mr. BERNER (Observer for the Association of the Bar of the City of New York) said that his delegation would feel more confident about inclusion if it heard how the draft Convention would benefit foreign-exchange transactions.

56. The CHAIRMAN said that the reverse situation applied. Since the Commission had in previous sessions taken a decision that the draft Convention should be applied as broadly as possible, the burden of proof fell on those who argued for exclusion. There was also the matter of draft article 4 (2), to which the United Kingdom had referred. It had originally been conceived as a safety valve of sorts, but the matter had still to be discussed.

57. Ms. GROSS (Observer for the International Swaps and Derivatives Association (ISDA) and the Financial Markets Lawyers Group) said that one of the most important benefits banks derived from netting was the opportunity to reduce their credit exposure to clients and reduce the capital they must maintain in the various countries in order to keep themselves strong. Chase Manhattan Bank, for instance, did \$3 trillion worth of transactions with counterparties, which,

through netting, could be reduced to an exposure of only \$30 billion. If, however, banks knew that their customers could assign receivables to counterparties, thereby destroying the mutuality necessary for netting, they would be required to maintain more capital for bank regulators, and internal credit exposure charges would in turn be higher, causing banks to raise their rates to their customers. Furthermore, if banks had to take steps to place the many transactions currently not covered by netting agreements under such agreements, that too would raise costs and ultimately would increase the banks' legal exposure and increase legal uncertainty. There were therefore very strong reasons why all foreign-exchange transactions should be excluded from the draft Convention.

58. Mr. FRANKEN (Germany) said he believed that the representative of ISDA was painting too dark a picture of the consequences of inclusion. Most substantial foreign-exchange transactions fell under agreements that contained a netting clause, so that the volume of transactions at issue was small. Also, one should never underestimate the inventiveness of banks: they were always able to circumvent problems. The clause in question would not cause the foreign-exchange market to collapse.

59. Mr. FERRARI (Italy) said that foreign-exchange contracts should be included in the draft Convention. The figures just given by the ISDA representative, presumably as an argument for exclusion, actually referred to transactions under netting agreements; but even if they did not, the market would not crash.

60. Mr. Al-NASSER (Observer for Saudi Arabia) observed that delegations had rightly referred to the importance of foreign-exchange contracts to developing countries. As an official of the Central Bank of Saudi Arabia, he himself had researched the reasons for delays in foreign-exchange transactions and had found that the main reason was the lack of an explicit foreign-exchange contract. Some countries maintained long-term contracts with banks in order to avoid currency-rates fluctuations. The issue had to be clarified and demystified. He urged the Commission not to exclude foreign-exchange transactions from the draft Convention.

61. The CHAIRMAN said that there was clearly a preference that foreign-exchange transactions should not be excluded.

62. He invited the Commission to consider exclusion (I) of the United States proposal (A/CN.9/XXXIII/CRP.4).

63. Mr. WINSHIP (United States of America) said that the proposal in subparagraph (I) for investment securities settlement systems had now been approved and combined with payment systems. However, subparagraph (I) also dealt with the sale or lending of investment securities, including repurchase agreements, known as repos. The transactions in question included investment security transactions which took place in well-established markets. Some rules in the draft Convention, especially the rules on priority, debtor protection and location, did not work well for such transactions. To apply the Convention to them would create uncertainty and would not be beneficial for the markets concerned.

64. The CHAIRMAN invited the Commission to decide whether the principle it had adopted for the previous exclusion should also apply in the present instance.
65. Mr. DESCHAMPS (Observer for Canada) supported exclusion of the rights specified in subparagraph (i), mainly because the law in that area was in a state of constant flux and national legislative systems were being amended to keep pace with it. Moreover, it was not certain whether the rules of private international law in the draft Convention were applicable to the law governing the sale of securities and securities entitlements. It also appeared that the Hague Conference on Private International Law was undertaking its own work on the topic. For those reasons, it seemed advisable to defer a decision on which rules of private international law were applicable to transactions of the type concerned.
66. Mr. RENGIER (Germany) said that the fear of impeding the operation of existing markets did not constitute a sufficient legal justification for excluding certain types of transaction from the scope of the draft Convention. If there was a need for exclusion, for instance because security investments were highly regulated under internal law, those concerns could be dealt with by way of the reservation formulated in draft article 4 (2), instead of a general exclusion clause.
67. Mr. MORÁN BOVIO (Spain) said that the solution contained in article 4 (2) was the least desirable one from the standpoint of the draft Convention. All of the Commission's efforts for the past few days had been aimed at preventing the list of exclusions from growing. The text itself must specify the limits of its own applicability.
68. The point was not simply that the repurchase agreements market was a well-functioning one. If the draft text was applied to that market, it could suffer distortions, particularly in the area of transferable securities. It did not seem appropriate to introduce a rule whereby the possibility of transferring securities through receivables deriving from securities should have absolute recognition as it did in the draft Convention. The primary advantage of the draft Convention was that it ensured that receivables were easily transferable. That brought it into direct conflict with many of the agreements in question, which frequently involved other aspects of the market. For those reasons, his delegation was in favour of maintaining the exclusion as reformulated.
69. Mr. FERRARI (Italy) said that his delegation was not in favour of dealing with the issue at hand by referring to article 4 (2).
70. Ms. KISSEDJIAN (Observer for the Hague Conference on Private International Law) said that the project to which the observer for Canada had referred was not a hypothetical one. The States members of the Hague Conference on Private International Law had taken a firm decision to launch the project at their Special Commission held in May. According to the expert presentations made on that occasion, not only national legislation but markets were in a state of flux. There were no established practices on the part of firms and of financial intermediaries which held securities. The fact that in Europe mergers were taking place not only between intermediaries but between stock exchanges would further complicate practice in that area. For those reasons, it would be

premature to establish any rule, even the one proposed by the Secretary of the Working Group, which delegations appeared to prefer.

71. The CHAIRMAN said that there appeared to be considerable support for the proposed exclusion in the Commission.

72. Mr. IKEDA (Japan) said that in the history of the Working Group, attempts had been made to exclude receivables in order to avoid conflicts stemming from the application of draft articles 11 and 12 to new banking operations. That should be kept in mind in evaluating the current proposal.

73. The CHAIRMAN suggested that it might be useful for the ad hoc discussion group to produce a new draft of the exclusions, incorporating the decisions reached after discussion, so that the Commission could compare what had been achieved with the proposals, in particular, variant B of draft article 5.

74. Mr. WINSHIP (United States of America) said he did not believe that his delegation's proposal was inconsistent with variant B.

75. The CHAIRMAN suggested that, in addition to a list of the exclusions arrived at after discussion of the United States proposal, a list could also be drawn up of the items not to be excluded, but to be tested against other provisions of the Convention, particularly draft articles 9 and 24. It was necessary to look at the text in its entirety in order to determine whether variant B was still needed and, if not, whether the text could stand on its own. If the Commission agreed to that approach, the discussion could be deferred until a text had been produced.

76. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices), summarizing the discussion on draft article 6, said that the location issues had been resolved; the definition of receivables financing had been put on hold, to be discussed in the context of the title and preamble of the draft Convention; subparagraph (H) of document A/CN.9/XXXIII/CRP.4 would be discussed in the context of the priority provisions; and the definition of trade receivables would be discussed only after the Commission had decided whether or not it would adopt variant B of draft article 5.

77. Ms. WALSH (Observer for Canada), referring to draft article 6 (k) (A/CN.9/470), suggested that the term "returned goods" should be excluded unless its meaning was clarified. Her delegation understood that the term was intended to refer to a situation where goods that were the subject of the original contract were returned by the other party to the contract, because they were defective, because the original contract was terminated, or because the goods were repossessed. The rationale for excluding such goods from the definition of "proceeds" was that it would be inappropriate to apply the choice-of-law rule, as set out in draft article 24, to proceeds which took the form of returned goods. She doubted, however, whether users of the draft Convention would understand that intention, given the summary language in which the subparagraph was drafted. Moreover, she questioned the need for such an explicit exclusion. Returned and repossessed goods were not proceeds of a receivable in the way in which such proceeds had been defined in the draft Convention.

78. Mr. SALINGER (Observer for Factors Chain International (FCI)) said that, in the minds of most factoring practitioners, returned goods constituted a large part of their recoveries from debtors and were in fact proceeds. If the factors did not have those proceeds, their risk increased enormously, as did the cost of their granting credit.

79. While he understood that there might be conflicts between the priority rules under the draft Convention and priorities from the standpoint of the laws of the State in which the goods were located, he believed that if the priority rules were applied once the proceeds had been returned to the State of the assignor, no conflict would ensue.

80. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that the issue to which the previous speakers had referred was reflected in draft articles 16, 24 and 26. That issue had been discussed at length in the Working Group, and it might be preferable to consider the definition of "returned goods", as well as the priority rules, in the context of the relevant articles.

81. Mr. RENGEL (Germany) said that the Commission had agreed that it would take up the proposal by the European Banking Federation concerning the definition of financial contract that was to be included in draft article 6. Moreover, with regard to the exclusions, the Commission had agreed in substance regarding inter-bank payment systems and security settlement systems. It was unclear whether definitions of those terms should also be included in draft article 6, as proposed by EBF.

82. The CHAIRMAN said that the previous speaker's question had been discussed when the Commission had considered the definitions in draft article 6.

The meeting rose at 6 p.m.